No. 78-237

In the Supreme Court of the United States

OCTOBER TERM, 1978

AQUA MEDIA, LTD. AND A. M. LIQUIDATING CO.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-24) is reported at 575 F.2d 222. The opinion of the district court (Pet. App. A-8 to A-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1978. A petition for rehearing was

denied on May 18, 1978 (Pet. App. B-23 to B-24). The petition for a writ of certiorari and the motion for leave to file a petition for a writ of common law certiorari were filed on August 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 28 U.S.C. 1651.[1]

QUESTIONS PRESENTED

1. Whether the district court may order rescission of an acquisition that violates Section 7 of the Clayton Act.

2. Whether a selling corporation may be named as a defendant in a suit brought by the United States to enforce Section 7 of the Clayton Act where title to the assets has passed to the acquiring corporation.

STATEMENT

On December 23, 1976, the United States filed a complaint charging that the acquisition of assets constituting the California high-purity industrial water service business of Aqua Media, Inc. by one of its competitors violated Section 7 of the Clayton Act, 15 U.S.C. 18 (Pet. App. A-9). Petitioners (the selling

[1] Petitioner's motion for leave to file a petition for a writ of common law certiorari does not set out any reason why the grant of jurisdiction under 28 U.S.C. 1254(1) is inadequate to authorize review of the court of appeals' judgment. We know of no such reason. The motion for leave to file therefore should be denied. See also *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

parties)[2] and the purchasers were named as defendants (Pet. App. A-9 to A-10). The complaint sought divestiture of the assets by the purchaser and rescission of certain ancillary agreements between the seller and purchaser or, in the alternative, rescission of the acquisition and the ancillary agreements (*id.* at B-6).

After a hearing, the district court granted the United States' motion for a temporary restraining order and a preliminary injunction to prevent petitioners from taking action that would impair their ability to comply with a final order granting the relief requested (Pet. App. A-1 to A-26). The court concluded that the government had demonstrated a reasonable probability of success at trial on the merits[3] and that rescission of the acquisition might

[2] After the sale Aqua Media, Inc. changed its corporate name to A. M. Liquidating Co. A group of Aqua Media, Inc. stockholders formed a limited partnership, Aqua Media, Ltd., to acquire and operate the remaining assets of Aqua Media, Inc., including its manufacturing business and its high purity industrial water service business outside California (*id.* at A-10 to A-13, B-2 to B-3). A. M. Liquidating Co. and Aqua Media, Ltd. were named as defendants in the complaint and are the petitioners here (Pet. 4).

[3] See Pet. App. A-13 to A-22. The district court found that Aqua Media, Inc. and the purchaser were the two leading competitors in the high-purity industrial water service market in California. They accounted for 80% of the sales in the state as a whole, more than 90% in the Northern California market, and 77% in the Southern California market (Pet. App. A-19 to A-20). Prior to the acquisition, the firms were engaged in intense price competition, and prices rose sharply in at least

be the only form of relief that would effectively restore competition (Pet. App. A-1). The court concluded that "[d]ivestiture may be difficult or impossible for want of an appropriate purchaser of the acquired assets" and that "[r]escission may be an effective, practical and feasible means of restoring competition in the affected markets. Rescission may be superior to other forms of relief" (*id.* at A-22).

Petitioners argued on appeal that no relief may be granted against the seller in a suit by the United States to enforce Section 7 of the Clayton Act once title to the assets has passed, and that rescission of an acquisition is never an available remedy in a Section 7 case.

The court of appeals affirmed (Pet. App. B-1 to B-24). It recognized that Section 7 speaks only to acquisitions, and it concluded that courts should attempt to fashion relief that does not affect the interests of the seller (Pet. App. B-10, B-16). The court observed, however, that Section 15 of the Clayton Act, 15 U.S.C. 25, is a source of equity jurisdiction to prevent and restrain violations of the Act in suits brought by the United States, and it relied on the traditional principle that the power of equity courts to fashion decrees molded to the necessities of the individual case is employed especially flexibly when the public interest in the enforcement of a federal statute

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one market after the acquisition (Pet. App. A-20 to A-21). The court also found that the acquisition raised barriers to entry in markets which were already highly concentrated and accelerated a trend toward concentration (Pet. App. A-21).

is in question (Pet. App. B-10 to B-11). Following this Court's admonition that the federal courts must use their equity powers in antitrust cases to formulate relief that will restore competition, *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), the court concluded that where effective relief cannot be decreed without the seller's participation, the fact that sellers are not violators of Section 7 should not "force courts to close their eyes to the fact that the sellers are parties to an acquisition which is prohibited by law" (Pet. App. B-10). Emphasizing that no final relief had yet been formulated in the case before it, and that the question was presented largely in the abstract, the court concluded that "rescission is not without the pale of equitable discretion in appropriate circumstances" (*id.* at B-15).[4]

After the court of appeals issued its decision, the parties stipulated to the entry of a final judgment, which was entered by the district court on September 18, 1978 (Pet. App. D-1 to D-29). That order dissolved the preliminary injunction and dismissed petitioner A. M. Liquidating Company from the litigation (*id.* at D-29). It directed the purchasers to divest themselves of specified assets within one year (*id.* at D-7 to D-8). If the purchasers fail to do so, a trustee will be appointed by the court to undertake the task (*id.* at D-7 to D-15). In the event that the trustee is unable to complete the divestiture, he may

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[4] The court also found that the district court had not abused its discretion by entering the preliminary injunction in this case (Pet. App. B-18 to B-22).

petition the district court to hold hearings for the purpose of determining what further relief is appropriate; at such a hearing, petitioner Aqua Media, Ltd. "shall not assert that this Court is without power to order such further relief as to Aqua Media as may be just," and neither the government nor the purchaser will assert that the district court lacks power to order the trustee to convey back to Aqua Media such assets as will accomplish or complete the divestiture (*id.* at D-23 to D-24).

ARGUMENT

1. Petitioners contend (Pet. 15-23) that the federal courts may not order rescission as a remedy for violations of Section 7 of the Clayton Act, 15 U.S.C. 18. The court of appeals' decision on this question is one of first impression, and there is thus no conflict among the circuits. In the absence of such a conflict—indeed, in the absence of any indication that the question arises frequently—there is no reason for the Court to grant review.

a. Petitioners contend (Pet. 15-17) that the language of Section 7, which proscribes only "acquisition[s]," controls the scope of relief available under Section 15. Because the seller does not acquire assets, and therefore does not violate Section 7, petitioners urge, it is improper to find in Section 15 authority to require the seller to accept the assets back again as part of the rescission of a sale. Petitioners err, however, in portraying Section 15 as no more than the grant of judicial authority to enforce

the literal terms of Section 7. This Court has held that Section 15 empowers courts to use their equity powers to restore competition in affected markets. *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326-327 (1961). This case therefore does not turn on arguments about what Section 7 does or does not forbid. It turns, instead, on equitable considerations that influence the shaping of relief once someone—if only the buyer—has violated Section 7 in a transaction in which petitioners, as the sellers, played an intimate role as facilitators of the unlawful acts.[5] After all, if petitioners had not sold their

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[5] Accordingly, the court of appeals' decision in this case does not conflict with *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), which held that sellers are not guilty of violating Section 7 and are therefore not liable for treble damages. Nor do the other cases cited by petitioners (Pet. 11-13) support the proposition that equitable relief may never be granted against a seller under Section 15 of the Clayton Act where such relief is necessary to restore competition and is not inequitable. *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968), which involved Section 3 of the Clayton Act, was also a treble damage action. In *Record Club of America, Inc.* v. *Capitol Records, Inc.*, 1971 Trade Cas. ¶ 73,694 (S.D.N.Y. 1971), the court dismissed the complaint for treble damages and injunctive relief against the sellers, finding that effective relief could be ordered without the seller's participation. In *United States* v. *Parker-Hannifin Corp.*, 1974-1 Trade Cas. ¶ 75,061 (C.D. Cal. 1973), the district court held that the seller had not violated Section 7 but was nevertheless a proper party defendant to an action brought by the United States under Section 15.

Similarly, the Federal Trade Commission held that, although a seller had not violated Section 7 of the Clayton Act, it might nevertheless be required to participate in the restoration of competition. Contrary to petitioner's assertion (Pet.

assets to their competitor, there never would have been a violation of Section 7. Petitioners are not bystanders.

Petitioners urge (Pet. 17-22), however, that the legislative history demonstrates that the purpose of Section 15 was to expand the geographic reach of the district court's powers, and that it was not intended to authorize the courts to order a seller to rescind a sales transaction.

Petitioner's extended discussion of the legislative history is beside the point, because it fails to demonstrate a clear legislative intent to limit the court's authority to formulate effective relief for clear violations of a statute. Once a case is properly before a court of equity, the court has full authority to formulate effective relief unless Congress clearly has restricted that authority.[6] The power to mold each decree to fit the necessities of the case is especially broad and flexible where the relief is designed to protect the public.[7] As this Court explained in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946):

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13), the FTC did not rely solely on its authority under the Federal Trade Commission Act. It relied as well on "the Commission's power as an equitable body to administer forms of relief that will fully effectuate the goals of the statute which it enforces." *Dean Foods Co.*, 70 F.T.C. 1146, 1293 (1966). (In *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966) this Court considered the propriety of the FTC's request for preliminary injunctive relief during the pendency of these administrative proceedings.)

[6] *E.g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *Clark* v. *Smith*, 38 U.S. (13 Pet.) 195 (1839).

[7] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).

> the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absense of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Neither the language nor the legislative history of Section 15 demonstrates any intent to limit the courts' equitable power to grant appropriate relief in cases brought pursuant to the Clayton Act, and the courts' authority thus extends to persons such as petitioners who played a substantial role in the unlawful act. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171-178 (1977). As this Court stated in an action brought by the United States to enforce Section 7 of the Clayton Act, "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. * * * [C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States* v. *E.I. duPont de Nemours & Co.*, *supra*, 366 U.S. at 326.

This does not mean, however, that relief routinely should require action by sellers. As the court of appeals indicated, the question whether rescission would be an appropriate remedy should be determined case by case. It emphasized that relief should involve the seller only where that is necessary and where the relief is not inequitable in light of the facts of the

case (Pet. App. B-16, B-18 to B-22).[8] As the court pointed out, in some cases there may be evidence that the seller knew that the acquisition was illegal or that it reaped a supranormal profit because of the anticompetitive nature of the transaction.[9] Or there

[8] The legislative history of the 1950 amendments to Section 7, which extended the statute's prohibition to acquisitions of assets, indicates that Congress recognized that prohibiting acquisitions would make it harder for sellers to find a purchaser, but it nevertheless concluded that the public interest in preventing anticompetitive acquisitions should take precedence over the owner's desire to sell. See *Hearings on H.R. 2734 Before a Subcomm. on Corporate Mergers and Acquisitions of the Senate Comm. on the Judiciary*, 81st Cong., 1st & 2d Sess. 134-135 (1949) (statement of Rep. Patman). Opponents of the legislation argued that it should not be enacted because it would hinder the owners of businesses who wished to sell, but their views were not accepted by Congress. See, *e.g.*, S. Rep. No. 1775, 81st Cong., 2d Sess. 21-23 (1950) (Sen. Donnell).

[9] If the acquisition is anticompetitive, it would make the assets worth more in the hands of the buyer (who can charge higher prices after the acquisition) than in the hands of the seller. The buyer and seller would often negotiate a price that gives to the seller part of the increase in value that is attributable to monopolizing. Rescission of the sale would cause the seller to lose the benefit of this increment, but there is no reason why sellers should be allowed to retain benefits made possible by the anticompetitive consequences of their transactions.

This discussion also illustrates one of the benefits of rescission as a remedy. The availability of rescission encourages sellers to examine the lawfulness of proposed sales and reduces an incentive that would otherwise exist to make unlawful sales. Moreover, despite petitioners' hyperbole, rescission would not compel an unwilling firm "to compete in a market from which it intentionally departed, and to invest its human and financial resources in a manner contrary to its independent best business judgment" (Pet. 23). After rescission

may be evidence that the seller, realizing the acquisition would probably be challenged, arranged to consummate the transaction before the government could learn of it. The consideration of the factors discussed by the court of appeals is well within the authority of a court of equity.[10]

b. Petitioners also make the closely related contention (Pet. 24-27) that sellers cannot properly be made parties to an action to enforce Section 7 of the Clayton Act once title to the sellers' assets has passed to its competitor. They urge that even though sellers may be joined as defendants when the United States brings suit to enjoin an unconsummated merger, Section 15 of the Clayton Act, which authorizes courts

petitioners could immediately resell the assets to any lawful purchaser. And petitioners would have far more incentive to preserve the value of the assets and to find such a purchaser than would the initial buyers. As monopolizers, the initial buyers usually seek to frustrate divestiture or, if divestiture is inevitable, to undermine the value of the assets as a source of future competition. That is why divestiture has sometimes proven to be an unsatisfactory remedy. See Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance With Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 Antitrust Bull. 19 (1972).

[10] Cf. *Restatement of Restitution* § 168 (1937) (transferree of property who has notice of his transferor's wrongdoing may be sued for restitution by a defrauded party). Courts of equity traditionally have exercised the power to order rescission of illegal contracts, even at the behest of a party guilty of participation in the illegality, where that remedy will protect the public interest. See S. Symons, *Pomeroy's Equity Jurisprudence* § 941 (5th ed. 1941); 14 W. Jaeger, *Williston on Contracts* § 1631 (3d ed. 1972); Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 19 U. Pa. L. Rev. 261, 297-298 (1947).

to "prevent and restrain" violations of the Act, does not authorize relief against sellers once title to the assets has passed to the purchaser (Pet. 24-25).

This argument fails for the reasons discussed above. It is well established that Section 15 authorizes relief, such as divestiture of assets, to eliminate the effects of the illegal acquisition that has already occurred. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *United States* v. *E.I. du Pont de Nemours & Co., supra*, 366 U.S. at 317; *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972). Nothing in the language of Section 15 suggests that post-consummation relief is barred with respect to sellers.[11] Although this Court has never passed on the question,[12] the lower courts have con-

[11] The language of Section 15 of the Clayton Act differs significantly from that employed in Section 16, 15 U.S.C. 26, which permits private actions for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." In *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975), the court concluded that because Section 16 permits injunctive relief only to restrain "threatened" loss or damage, it does not authorize post-acquisition structural relief. By contrast, Section 15 authorizes the district courts "to prevent and restrain violations of this Act."

[12] On appeal from the district court's original dismissal of the government's claim in *United States* v. *E.I. du Pont de Nemours & Co., supra*, 353 U.S. at 608, this Court held that:

> The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.

The propriety of relief against the sellers was left open by this Court's second opinion in that case. *United States* v. *E.I. du Pont de Nemours & Co., supra*, 366 U.S. at 334-335.

sistently held that the seller may properly be retained as a defendant in suits brought by the United States under Section 15 to enforce Section 7 of the Clayton Act. *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1261-1262 (C.D. Cal. 1973), aff'd mem., 418 U.S. 906 (1974); *United States* v. *Parker-Hannafin Corp.*, 1974-1 Trade Cas. ¶ 75,061 (C.D. Cal. 1973); *United States* v. *Pabst Brewing Co.*, 183 F. Supp. 220, 221 (E.D. Wisc. 1960);[13] *United States*

[13] Petitioners attempt to distinguish *United States* v. *Pabst Brewing Co., supra*, on the ground that the parties closed the acquisition in spite of their knowledge that the government intended to challenge the acquisition (Pet. 14). That, however, would not affect the court's power to retain the seller as a defendant. It concerns, at most, the appropriate scope of relief. But if, as petitioners' treatment of *Pabst* indicates, they acknowledge that seller culpability may make relief appropriate, then it should follow that relief is appropriate against petitioners. Evidence that the seller was formally notified of the government's intent to challenge a merger is not the only evidence of culpability which may be relevant. Certain facts in the instant case suggest that petitioners realized that the acquisition was illegal. The president of Aqua Media, Inc. personally estimated the market shares of the companies as 44% and 36% and considered the purchaser his company's "closest and most dangerous competitor" (Plaintiff's Exh. 20, Tr. of March 14, 1977 at 68-70). He admitted that the vice president of the purchasing firm told him early in the negotiations that Aqua Media's business would be worth more to these purchasers than to any other firm (Tr. of March 14, 1977 at 71). The transaction was consummated, without any

v. *E. I. du Pont de Nemours & Co.*, 177 F. Supp. 1, 10-12 (N.D. Ill. 1959), rev'd on other grounds, 366 U.S. 316 (1961).

2. We have argued above that the decision of the court of appeals is correct. Review by this Court is inappropriate for the additional reason that the question is not squarely presented. First, there has been no rescission order and may never be any. The consent order (see pages 5-6, *supra*) requires divestiture, not rescission; it simply leaves open the question what relief will be ordered if divestiture is not accomplished. The courts have held that rescission is a possible remedy, but it remains a contingency that may never occur in this case. There is no reason why this Court should assess the prospective legality of such a contingent possibility—especially since the question would be presented only in the abstract, apart from the considerations that might impel the use of rescission as a remedy in particular circumstances.

Second, the consent order itself saps the case of prospective importance. Petitioner A. M. Liquidating Company has been dismissed from the litigation. The preliminary injunction from which petitioners appealed has been dissolved. Petitioner Aqua Media,

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public notice, less than two weeks after the parties entered into the agreement (CT. 29, 32, 82, 83). ("CT." refers to the clerk's transcript.) Petitioner A. M. Liquidating Co. continued to distribute the proceeds of that sale to its stockholders after it was notified that a formal investigation had been undertaken by the Justice Department and that the government was considering filing suit (CT. 28, 35, 49, 50, 83, 84).

Ltd. has consented to the entry of an order directing it to take certain actions designed to assist the purchaser in divesting the assets (Pet. App. D-21 to D-23). The consent judgment preserves the possibility of further relief involving petitioner if divestiture of the assets proves impractical, and provides that petitioner will not assert that the district court lacks power to enter further relief (Pet. App. D-23). Petitioner Aqua Media, Ltd. has thus waived the right to contest any decree of rescission on the ground that such remedy is not permissible in suits brought by the government to enforce Section 7. We do not argue that the case is moot, for the district court has retained jurisdiction to supervise the process of restoring competition (*id.* at D-29). Aqua Media may yet be affected by a judicial order. But the legal issue raised in the petition is no longer a subject of controversy between the parties to the case.[14]

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[14] In our view, it is not necessary for this Court to determine whether the petition presents a live case or controversy, because the petition should be denied in any event. For the reasons stated at pages 4-8 of the Brief for the United States in Opposition filed in *Velsicol Chemical Corp.* v. *United States*, cert. denied, No. 77-900 (March 27, 1978), we submit that the Court should not exercise its discretion to vacate judgments because of mootness arising after the decision of the court of appeals, where the petition would not otherwise have been granted. We are sending petitioners a copy of our brief in *Velsicol*. The argument against vacating the judgment in the court of appeals is even stronger in this case than in *Velsicol*, because the possibility of mootness arises only because of petitioners' voluntary waiver of their right to contest the entry of the final judgment order.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of common law certiorari should be denied.

Respectfully submitted.

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